No. 460

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE STATE OF NEW YORK and POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioners,

v.

JOHN M. ANDREWS, LENA BRITTON and VELMA NILES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' brief in opposition to the petition for certiorari demonstrates clearly that the petition should be granted. In Point I it argues that the highest and best available use of the property was for power purposes and that its value was properly fixed on that basis. The brief not only concedes but avers that the Court of Claims so valued the property and that the Appellate Division of the Supreme Court and the Court of Appeals affirmed its

doing so. This confirms that the New York courts refused to apply the doctrines of *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), *United States* v. *Miller*, 317 U. S. 369 (1943), *United States* v. *Cors*, 337 U. S. 325 (1949), *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956) and *United States* v. *Virginia Electric and Power Co.*, 365 U. S. 624 (1961). It is important that this Court specifically affirm the application of those doctrines to the taking of land in state courts pursuant to authorization of the Federal Power Act for a federally authorized power project and a federally constructed navigation project.

After demonstrating in Point I that from the outset the property was needed for project purposes and thus that it was always probable and likely that it would be taken, the brief with complete inconsistency argues in Point II that there was an enlargement of the project within the meaning of the *Miller* case. However, the facts set forth in the brief show that there was no enlargement. The brief argues that there was an enlargement because a witness testified at the trial in 1958 that he had in his possession a map prepared in 1956 showing that transmission lines from Barnhart Island would cross adjoining land rather than respondents' land and that later the project plans were changed so that those lines were placed on respondents' land. The brief (p. 3) shows, however, that an appropriation map covering respondents' entire property had been filed early in 1955. Thus, even if there was a time in 1956 when plans for the project, construction of which had commenced in 1954, did not contemplate use of the property for that one set of transmission lines and these plans were later changed this would not constitute an enlargement of the project because the process of taking the entire property had been initiated and the Authority had entered and taken

possession of it more than a year earlier.* The brief does not mention two other sets of transmission lines which came from Canada and crossed the property, nor does it mention the fact that, as we showed in our petition, the property was taken for several other project purposes including the seaway canal and overflow from it, all as planned in the Corps of Engineers report issued in 1942.

Respondents' brief (p. 7) states that "The opinion in the Court of Claims holds that Claimant's Exhibit No. 34, prepared by the United States Corps of Engineers in 1942 'does not show this property as being used for any part of the comprehensive river development,' ". As we pointed out in our petition apparently the Court was of the opinion that unless property is flooded by the actual damming of the stream it is not used as part of a comprehensive river development even if used for a canal to bypass dams and used to transmit power developed from the stream and for other purposes of the joint project. This is the only conclusion possible because the Exhibit shows the seaway canal and overflow from it utilizing a good part of the property and the 1942 report shows that the entire property would be taken for project purposes (Petition, pp. 11-12).

As we have shown in our petition, even if there had been an enlargement the Court of Claims award was wrong because as that Court categorically stated and as the Court

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* As we amply demonstrated in our petition and a reading of the whole record shows, it was always probable and likely that the property would be used for transmission lines from Barnhart Island as well as other project purposes despite the testimony of the witness and his apparent misreading of the 1956 map he had in his possession (R. 41-42, 71, 120-121, 206, 215). Respondents' own witness testified that the property constituted the most logical location for such lines (See R. 215).

of Appeals pointed out it was based upon use of the property for the very purposes of the project.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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